Tam Ley Chian v Seah Heng Lye

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–211–89
SELVENTHIRANATHAN JC
16 OCTOBER 1993

Family Law *— Children — Guardianship — Marriage of parents not solemnized under Law Reform (Marriage and Divorce) Act 1976 — Illegitimate child — Whether putative father has rights over child — Whether court had jurisdiction to appoint and control guardians of illegitimate infants — Law Reform (Marriage and Divorce) Act 1976 — Courts of Judicature Act 1964 s 24*

The plaintiff and defendant were married under Chinese custom but their marriage was not solemnized in accordance with the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). A child was born to the couple but due to some misunderstanding, the plaintiff was evicted from the matrimonial home and the child forcibly removed from her care and custody. The plaintiff has applied for an order that she be appointed guardian of the child, averring that she is the natural mother of the child and that because the marriage was not solemnized in accordance with the Act, the child was therefore born out of wedlock and was illegitimate under the law.

Held, allowing the plaintiff's application:

(1) The parties agreed in their respective affidavits that their marriage was void. Therefore, the child was illegitimate. Where a child is illegitimate, the putative father has no rights over him under the common law.

(2) Section 24 of the Courts of Judicature Act 1964 confers the High Court with the jurisdiction to appoint and control guardians of infants, which must also include illegitimate infants.

[Bahasa Malaysia summary

Plaintif dan defendan telah berkahwin mengikut adat orang Cina tetapi perkahwinan mereka tidak diupacarakan mengikut Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu'). Seorang anak telah dilahirkan kepada pasangan itu tetapi disebabkan salah faham, plaintif telah diusir keluar daripada kediaman suami isteri dan kanak-kanak itu telah diambil secara paksa dari penjagaannya. Plaintif telah memohon untuk mendapat suatu perintah supaya beliau dilantik sebagai penjaga kanak-kanak itu. Beliau telah menegaskan di dalam afidavitnya bahawa beliau merupakan ibu sebenar kanak-kanak itu dan bahawa oleh kerana perkahwinan itu tidak diupacarakan mengikut Akta itu, kanak-kanak itu telah dilahirkan di luar nikah dan adalah anak tidak sah taraf di bawah undang-undang.

A **Diputuskan**, membenarkan permohonan plaintif itu:

(1) Pihak-pihak kepada tindakan ini telah bersetuju di dalam afidavit masing-masing bahawa perkahwinan mereka adalah tidak sah. Oleh itu, kanak-kanak itu adalah anak tidak sah taraf. Apabila seseorang kanak-kanak itu tidak sah taraf, orang yang dianggap sebagai ayahnya tidak mempunyai hak ke atasnya di bawah
B common law.

(2) Seksyen 24 Akta Mahkamah Kehakiman 1964 memberikan Mahkamah Tinggi bidang kuasa untuk melantik dan mengawal penjaga kanak-kanak, yang semestinya merangkumi kanak-kanak tidak sah taraf.]

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[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–445–93.]

Notes

For cases on the guardianship of children, see 7 *Mallal's Digest*
D (4th Ed) paras 1496–1501.

Cases referred to

1 *R v Brighton (Inhabitants)* (1861) 1 B & S 447 (refd)
2 *Horner v Horner* (1799) 1 Hag Con 377 (refd)
3 *T v O* [1993] 1 MLJ 168 (distd)
E 4 *Paton v British Pregnancy Advisory Service Trustees & Anor* [1978] 3 WLR 687; [1979] QB 276; [1978] 2 All ER 987 (refd)

Legislation referred to

Civil Law Act 1956 s 27
F Courts of Judicature Act 1964 s 24
Law Reform (Marriage and Divorce) Act 1976 s 6(1)

Tan Boon Hee (*Tan Teh & Co*) for the plaintiff.

Ranjit Singh and *Gooi Hock Seng* (*Jagjit Singh & Co, Shan & Gooi*) for
G the defendant.

Selventhiranathan JC: The plaintiff, Tam Ley Chian, applied by way of this originating summons (encl (1)) on 21 March 1989 for the following orders:

H (i) that she be appointed guardian of the infant, Seah Yee Sheau, in place of the defendant;
(ii) that care and custody of the infant be granted to her;
(iii) that the defendant forthwith deliver the infant to her;
(iv) costs; and
(v) further or other relief as deemed fit.

I The application was supported by her affidavit affirmed on 4 March 1989 wherein she deposed that she is the natural mother of the infant who was

born on 31 July 1987 and that the defendant, Seah Heng Lye, is the natural father. She averred that the marriage between herself and the defendant in June 1986 which was only solemnized under Chinese custom was void since it was not solemnized in accordance with the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and that in consequence thereof the infant was born out of wedlock and is an illegitimate child under the law. Prior to her separation from the defendant on 14 March 1988, she had lived with the defendant in his family home and had cared for and nursed the infant from birth and had never been separated from him. However, subsequently, she was assaulted and evicted by the defendant and his parents from the matrimonial home after some misunderstanding over domestic matters, and the infant was forcibly removed from her care and custody and had since been taken cared of by the parents of the defendant.

The plaintiff further averred that she had not been allowed to have access to the infant at all since her eviction from the defendant's home and all attempts to obtain access to him had been resisted by the defendant and his parents and they had all wilfully stopped her from even having sight of her infant child.

On 3 November 1988, she instructed her solicitors to write to the defendant for the return of her child but the defendant had refused to accept the letter. She further deposed that the parents of the defendant were not suited to provide for the well-being of her child and she feared that he may be deprived of maternal love and affection in the circumstances and that the defendant by himself could not care for the child.

On the other hand, she was gainfully employed as a quality controller earning about RM350 a month and was able to support herself. She further stated that she was living with her parents whose home was very near her place of work. The state and condition of her home and the surrounding environment were sufficiently congenial for the material comfort and emotional well-being of her child. Her parents, brother and sister who were residing with her were supportive of her and were prepared to assist her in the care of her child if she was granted custody. If guardianship and custody were granted to her, she would have no objection to the defendant having reasonable and liberal access to the infant. She averred that it was of paramount importance to the welfare of the infant that custody be granted to her and that she be appointed as guardian.

The defendant filed an affidavit in reply affirmed on 21 August 1989. He referred to paras 1 and 2 of the affidavit of the plaintiff and confirmed it. In paras 1 and 2 of her affidavit, the plaintiff had categorically averred that her marriage to the defendant, solemnized under Chinese custom, was void since it was not solemnized in accordance with the Act and in consequence thereof, the infant son born to them was born out of wedlock and was an illegitimate child under the law.

The defendant further deposed to various other facts to resist the application of the plaintiff. Those facts are not immediately relevant.

At the hearing of this application on 23 July 1993, before me, Mr Tan Boon Hee for the plaintiff submitted that the preliminary issue of the illegitimacy of the child should be determined first. If the child is illegitimate,

custody and care should go to the plaintiff as the mother. Mr Ranjit Singh for the defendant agreed. I therefore made an order by consent that the preliminary issue of legitimacy be decided first.

Mr Tan submitted that the 'marriage' between the plaintiff and the defendant had not been contracted according to the provisions of the Act, in particular Pt III thereof. The Act came into force on 1 March 1982 and the 'marriage' had been celebrated according to Chinese custom in June 1986. The child in question was born on 31 July 1987. It was the plaintiff's contention that there was no marriage between her and the defendant and that she only lived together or cohabited with him in an illicit union. This was not disputed.

Mr Tan submitted further that if the marriage between the plaintiff and the defendant was valid, the guardianship of the child would be with the father under the Guardianship of Infants Act 1961 (the '1961 Act'). However, where the child is illegitimate, the position is different. The court had jurisdiction over an illegitimate child under the 1961 Act. The parental rights in relation to such a child, ie custody and control, lay with its natural mother from birth and subsisted until the court ordered otherwise. As the law stood, the putative father, ie the defendant, had no right over the child under the civil law. On the other hand, the natural mother, who had the obligation to maintain her illegitimate child, had exclusive care and custody. At most, the natural father could only express his wishes over the welfare of the child. He referred to *R v Brighton (Inhabitants)*[1] where Cockburn CJ had held that the father of an illegitimate child is not recognized by the law of England for civil purposes. He further referred to *Horner v Horner*[2] at p 352. At this juncture, Mr Ranjit Singh for the defendant conceded that if the child was illegitimate, the putative father had no rights.

Mr Tan then went on to submit on the validity of the marriage. He referred to s 5 of the Act which stipulates that no marriage under any law, religion, custom or usage may be solemnized except as provided in Pt III of the Act. In the present case, the marriage was not solemnized under the Act. No customary or religious marriage ceremony is recognized unless it is performed under the Act, and none was so performed. Therefore, it was his submission that there was no marriage between the parties and the child was illegitimate. Mr Tan also referred to the affidavit by the defendant wherein the defendant himself confirmed that his marriage to the plaintiff was void which distinguished the present case from *T v O*,[3] a decision by Mahadev Shankar J. He therefore prayed for an order in terms of the application and withdrew the application in encl 10 whereby it was sought to make the infant a ward of the court and for the plaintiff to be appointed his guardian and for his care and control to be committed to her.

Mr Ranjit Singh submitted that in view of the admission by the defendant in his affidavit that the marriage between him and the plaintiff was void, there was very little else left in the matter and requested for access to the infant by the defendant. Mr Tan thereupon asked for an ancillary order that the defendant deliver the child to the sheriff of the court as the defendant had been uncooperative earlier (he had failed to give effect on a number of occasions to an earlier interim order made by Edgar Joseph Jr J (as he then

was) allowing interim access to the plaintiff as mother), and that failing that, the execution of the order of the court was to be carried out. Mr Ranjit Singh then asked that the ancillary order not be granted pending the working out of arrangements between the parties in relation to the child. The child had been with the father since birth and it would be traumatic to remove him suddenly from his surroundings.

I struck out encl 10 upon its being withdrawn. I made an order in terms of the application in the summons but deferred the enforcement of prayer (iii) therein. Prayer (iii) required the defendant to deliver the child forthwith to the plaintiff. I deferred this until 13 August 1993 when the case was to be called up again to find out whether the ancillary matters had been agreed upon by the parties. By consent no order was made as to costs.

On 19 August 1993, the defendant, after a change of solicitors, filed a notice of appeal against the whole of my decision given on 23 July 1993.

My decision on 23 July 1993 was based on the admission or concession by the defendant in his affidavit that his 'marriage' to the plaintiff under Chinese custom was void in the light of s 5(4) of the Act. That section provides that no marriage under any law, religion, custom or usage may be solemnized except as provided in Pt III of the Act. The 'marriage' between the plaintiff and the defendant, being one solemnized under Chinese custom, was certainly not solemnized as provided in the said Pt III. The question then arises as to what is the status of such a 'marriage'? Section 6(1) of the Act provides the answer: 'Every marriage contracted in contravention of section 5 shall be void.'

The parties agreed in their respective affidavits that their 'marriage' was void. In the circumstances, there was nothing that the court could do by way of proceeding to consider whether there was a valid marriage between the parties despite non-compliance with the provisions of the Act as Mahadev Shankar J was wont to do in the case of *T v O*.[3] In their fight for the custody of the child, his natural mother and putative father do not appear to have been concerned with whether the position that they took in relation to their 'marriage' would have the effect of visiting their child with the taint of illegitimacy.

However, where a child is illegitimate, the putative father has no rights over him under the common law. As Sir George Baker P commented in *Paton v British Pregnancy Advisory Service Trustees & Anor*[4] at p 690:

> ... I would say a word about the illegitimate, usually called the putative, but I prefer myself to refer to the illegitimate father. Although American decisions to which I have been referred concern illegitimate fathers, and statutory provisions about them, it seems to me that in this country the illegitimate father can have no rights whatsoever except those given to him by statute. That was clearly the common law.

Section 27 of the Civil Law Act 1956 provides as follows:

> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

A Section 24 of the Courts of Judicature Act 1964 confers the High Court with jurisdiction to appoint and control guardians of infants, which must include illegitimate infants. That section is reproduced in toto below to appreciate its full effect:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High
> B Court shall include—
>
> (a) jurisdiction under any written law relating to divorce and matrimonial causes;
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;
> C (c) jurisdiction under any written law relating to bankruptcy or to companies;
> (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;
> (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
> D (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

It will be seen that while paras (a) and (c) of s 24 refer to the jurisdiction of the High Court under any *written law*, para (d) is in general terms which E must necessarily mean jurisdiction of the nature stipulated under written law *as well as* common law.

However, in this case, Mr Tan submitted that the court had the jurisdiction to make an order granting guardianship in respect of an illegitimate child under the 1961 Act. No submission was made to the contrary. In the light F thereof, I proceeded to make the order sought.

Order accordingly.

Reported by Jeanne Tan

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